United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1092

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P/S

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For the Second Circuit

OVERSEAS AFRICAN CONSTRUCTION CORPORATION, Employer, and ST. PAUL MERCURY INSURANCE COMPANY, Carrier,

Plaintiffs-Appellants-Appellees,

against

EUGENE McMULLEN, Dec'd, by GEORGE McMULLEN, Executor and JOHN D. McLELLAN, JR., Deputy Commissioner, United States Employees' Compensation Commission, Second Compensation District,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE-APPELLANT EUGENE McMULLEN, DEC'D BY GEORGE McMULLEN, EXECUTOR

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Questions Presented on Appeal

1. Appeal filed by plaintiff, whether the U. S. District Court committed reversible error in sustaining the findings of fact made by the Deputy Commissioner, after a hearing, that Eugene McMullen was a covered employee under the Defense Base Act.

2. Defendant Eugene McMullen appeals the U. S. District Court ruling on the grounds that:

a. The court below erred in not finding the appeal taken by plaintiff to be without reasonable

grounds and therefore, should have assessed all attorneys fees against the plaintiffs or

b. In the alternative, the court below should have assessed additional attorneys fees in the amount of $1,800.00 solely against the plaintiffs as per the Longshoremen's and Harbor Worker's Compensation Act as amended November 26, 1972 (33 U. S. C. 928).

Statement of the Case

The dec'd, Eugene McMullen, (hereinafter referred to as the claimant), was employed by the plaintiff, Overseas African Construction Corporation (hereinafter referred to as the employer) as a chief accountant and office manager to do work in Chisimaio, Somali, Africa (Tr of hearing January 25, 1972, Exh #3 for Deputy Commissioner) and said contract of employment provided for compensation benefits to be paid to the claimant pursuant to the Defense Base Act (Tr Exh #3 for Deputy Commissioner, Section 7(a) of said contract).

During the course of this employment, the claimant contracted a severe case of neurodermatitis causally related to his work activities in Somali, which required hospitalization, medical care by a private physician, and a protracted period of disability from the onset of said condition until his demise January 30, 1972.

Pursuant to the provisions of the employment contract mentioned above (Exh #3 for Deputy Commissioner), the employer secured coverage for compensation benefits as provided by the Defense Base Act and the plaintiff, St. Paul Mercury Insurance Company (hereinafter referred to as the carrier), issued a policy specifically covering

this claimant under said act bearing policy #C3989 (Tr p. 11, Exh #1 for Deputy Commissioner).

The claimant made a claim under said contract of employment for compensation benefits which was controverted by the carrier on the grounds:

1. In behalf of the carrier *only* (not the employer), the Public Law 208 on this job contract is not applicable.

2. No accident or occupational exposure.

3. No medical evidence or causal relationship or causally related disability.

4. That the claimant failed to file within the statutory period.

5. Claimant had a pre-existing condition (Tr p. 9).

The employer appeared at the hearing conducted by the Deputy Commissioner on January 25, 1972 by its *own* attorneys, Weil, Gotshal and Manges, by Myron J. Meadow of counsel, and admitted that the claimant was employed and covered under Public Law 208 (a/k/a Defense Base Act), and that the employer was engaged in an A. I. D. (Aid to Industrial Development) project in Chisimaio, Somali, and specifically requested that any award made be directed against the carrier (Tr pp. 10, 11 and 12). That notwithstanding all of the *five* objections raised by the carrier and enumerated above, it presented *no* evidence whatsoever to support its contentions although it had a number of years to gather and present such evidence. Belatedly after the conclusion of the hearing, the carrier submitted a letter dated February 22, 1972, which the Deputy Commissioner introduced in evidence as carrier's exhibit B.

The Deputy Commissioner therefore had before him when he made his decision dated June 22, 1972:

1. The claimant's testimony that the work to be done was to improve cargo handling facilities and a water supply (Tr p. 25) for Chisimaio. There was also a warehouse for the Post Exchange and the U. S. Army Corps of Engineers were supplied from the employer's stores (Tr p. 27). The Corps of Engineers *supervised the entire project* and were physically present in the area (Tr p. 28). The claimant also prepared vouchers requesting reimbursement through A. I. D. and actually saw documents from the A. I. D. office in Italy as well as the U. S. Corp of Engineers Office (Tr pp. 32, 33).

2. The employer's concession made on the record that there was employment and coverage under the Defense Base Act.

3. Exhibit B mentioned *supra* alleging that the work to be done was on a direct loan basis.

Based on the evidence presented, the Deputy Commissioner found as a finding of fact the claimant was engaged in work activity specifically covered under the Defense Base Act (see Order of Deputy Commissioner dated June 22, 1972 Appendix for plaintiffs-appellants-appellees, 6a-7a).

Pursuant to the provisions of the Act (33 U. S. C. 921 and 42 U. S. C. 1651, *et seq.*), the plaintiffs-appellants-appellees appealed this Compensation Order to the U. S. District Court for the Southern District. On motion of both defendants for a summary judgment, the court granted summary judgment in favor of both defendants,

imposed a 20% penalty on the award for failure to make payment of compensation as provided by law and allowed an additional fee in favor of claimant's attorneys to be assessed against the claimant's award, and the Estate of Eugene McMullen.

The carrier has appealed said Compensation Order on the grounds that there is no jurisdiction since claimant's employment does not come within the provisions of the Defense Base Act.

The claimant cross appealed on the ground that the appeal by the carrier is not on reasonable grounds and that the attorneys fees should be assessed under Section 926 or 928 of the Longshoremen's and Harbor Worker's Compensation Act.

The defendant, McLellan, has also appealed on similar grounds except that in the event the Court does not sustain claimant's contention that the entire attorneys fees should be assessed against the carrier, then Sec. 928A of said act as amended should be applied.

In accordance with Section 928 of the Longshoremen's and Harbor Worker's Compensation Act this Court is requested to fix an additional fee against the carrier for the claimant's attorneys for services rendered in connection with the instant appeal and cross appeal before the Circuit Court.

ARGUMENT I

The Deputy Commissioner is the trier of the facts and determinations and conclusions made by him cannot be set aside unless unsupported by the record as a whole.

The Deputy Commissioner in the compensation order filed June 22, 1972 (see plaintiff-appellee's appendix exhibit A to Complaint) found that there was jurisdiction under the Defense Base Act (42 U. S. C. 1651(a)) as extended by the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. 901 et seq.). The transcript of the record of the hearing held January 25, 1972 contains substantial evidence to support this finding to wit, claimant's own testimony wherein he stated that the work to be done in Somali consisted of the installation of water supply for Chisimaio and the improvement of port facilities at Serpenti Island (Tr pp. 22-25), that a warehouse was maintained for the Post Exchange and the employer supplied the U. S. Corps of Engineers from its own stores (Tr p. 27), and that the U. S. Corps of Engineers supervised the entire project (Tr p. 28). The claimant also testified that he in his official capacity as chief accountant prepared and forwarded vouchers to the U. S. Corps of Engineers which vouchers were processed through A. I. D. (Tr pp. 32-33) for payment for the work done by the employer.

Secondly, the employer through its own counsel acting separate and apart from the carrier, admitted on the record that the employment of the claimant and the work activities for which the claimant was hired came within the provisions of the Defense Base Act (Tr pp. 10, 11), and that it procured a specific policy covering the claimant under Public Law 208 a/k/a the Defense Base Act. Why would an employer incur the expense of a compensation

policy if it did not believe it was subject to said law and what is more why would an insurance carrier issue a policy (Tr pp. 184-198 Exhibit #1 for Deputy Commissioner) and collect a premium therefor, if there was no insurable risk?

The employer and the claimant entered into a contract of written employment which specifically provided under Section 7(a) Tr Exhibit #3 p. 200 that coverage under the Defense Base Act would be maintained. It certainly would appear that the most knowledgeable persons who could give information on this point is the employer and the claimant as chief accountant and both have unequivocably given evidence which the Deputy Commissioner has accepted and concluded as a matter of fact that there is jurisdiction as defined under the Defense Base Act, *O'Leary* v. *Brown Pacific-Maxon, Inc.*, 340 U. S. 504 (1951), *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U. S. 469 (1947), 33 U. S. C. 921 as amended November 26, 1972 which holds that it is immaterial that the facts may permit the drawing of diverse inferences. The Deputy Commissioner above is charged with the duty of initially selecting which inference is most reasonable and if sustained by the record, cannot be disturbed by a reviewing court.

33 U. S. C. 935 provides:

> SUBSTITUTION OF CARRIER FOR EMPLOYER
>
> "SEC. 935. In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of

> the employer in respect to such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, *the Board, or* the Secretary, or any court under this Act shall be jurisdiction of the carrier and (3) any requirement by a deputy commissioner, *the Board or* the Secretary, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer."

It is clear therefore that the carrier stands in the place of the employer and not separate and apart. The concession of the employer on the record *ipso facto* is the concession of the carrier.

ARGUMENT II

The carrier controverted this claim without reasonable grounds and therefore should be held liable for all costs of these proceedings including all attorneys fees.

The carrier and employer do not deny the existence of a policy providing coverage for compensation benefits under the Defense Base Act (Tr pp. 14 and 15, exhibit #1 pp. 184-194). During the entire hearing on January 25, 1972, no medical evidence was introduced by the carrier or the employer to controvert the period of disability nor the medical evidence presented on causal relationship. Nor did the carrier ever request the claimant to be ex-

amined at any time during these proceedings from 1968 to the time of the claimant's death, January 30, 1972.

The claimant first tried to establish compensability under the New York State Workmen's Compensation Law, but the carrier represented through the same counsel successfully resisted compensability on the grounds of no New York State jurisdiction. The claimant then properly instituted proceedings to establish compensability under the Defense Base Act and notwithstanding the *employer's* concession on the record that there was jurisdiction under the Defense Base Act, continued to controvert the claim. If there is no Federal or State jurisdiction for a compensable claim, where must the claimant go for his remedy? Is it consistent for the carrier to allege it has a policy which provides for compensation benefits under the Defense Base Act, and yet the Deputy Commissioner who is by law empowered to process and administer such claim (42 U. S. C. 1653, 33 U. S. C. 901 *et seq.*), has no jurisdiction over the parties? For the purpose of this argument only if it is assumed that there is no New York State of Federal jurisdiction but that the Defense Base Act and the Longshoremen's and Harbor Worker's Compensation Act applies why were not *compensation* payments made as provided by said Acts and more especially under 33 U. S. C. 914. This is a social form of legislation and specifically enacted with a view toward voluntary payments by the carrier, for disability and medical care. The record is devoid of any affirmative voluntary act required under said laws nor in fulfillment of the terms of employment or the policy of insurance obtained by the employer. Herein lies the crux of the claimant's allegation that the carrier controverted this claim without reasonable ground and in violation of Section 926 of the Longshoremen's and Harbor Worker's Compensation Act. There is no requirement under this statute that the plain-

tiff's position be frivolous or malicious as indicated in the decision by the District Court; it only requires that it be without reasonable ground. If it had shown some evidence of good faith in attempting to meet its obligation under the terms of its insurance policy, then this contention under Section 926 would never have been made. As further evidence of the utter contempt the carrier has shown for this claim both during the claimant's lifetime and even up to the present, it continues to ignore the mandate of the law under Section 921(b)(3) as amended 11/26/72 and Section 921(b) prior to said amendment which requires payment of an award notwithstanding an appeal, nor can the carrier take refuge in the bond it has filed with the Court in order to appeal to the Circuit Court since both the intent of the law as well as the District Court Judge's order imposing a penalty of 20% for failure to pay the award and denying a stay of payment of the award by said order required payment of the judgment in full. In short, the carrier has decided not to make any payment and is willing to incur the full penalty involved by its refusal. Therefore, Section 926 *supra* should be invoked by the Court.

ARGUMENT III

In the event that the Court does not invoke Section 926 as requested in Argument II, then Section 928 of the Longshoremen's and Harbor Worker's Compensation Act as amended is applicable.

The brief for the Defendant-Appellee-Appellant John D. McLellan, Jr., Deputy Commissioner has adequately covered the law in respect to the attorneys fees which are incurred by a claimant under the amended law 33 U. S. C. 928. However, a recent decision by the Benefits Review Board on April 2, 1974 (this Board, under the amended

Longshoremen and Harbor Worker's Compensation Act, Section 921(b)(3) replaces the U. S. District Court for the purposes of appealing a Compensation Order) in the case of *Virginia Hotel Co. & Liberty Mutual Insurance Company, Petitioners* v. *Evelyn Mills, Respondent,* has decided that the carrier is liable for all attorney's fees incurred by the claimant for services rendered after November 26, 1972. Since this is an unreported decision, the following is a direct quote of that part of the case which is related to this subject:

"UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

Filed As Part
Of The Record

April 2, 1974
(date)

ELIZABETH ROGERS RITZ
(Clerk)

Benefits Review Board

BRB No. 133-73

DECISION OF THE BOARD

VIRGINIA HOTEL COMPANY

and

LIBERTY MUTUAL INSURANCE CO.

Petitioners

v.

EVELYN MILLS

Respondent

Appeal from Decision and Order and Supplemental Decision and Order of John A. Fenton, Administrative Law Judge, United States Department of Labor.

Russell E. Bond, Washington, D. C. (Macleay, Lynch, Bernhard & Gregg) for petitioners.

Philip J. Lesser, Washington, D. C. (Lesser & Lesser) for respondent.

Jean S. Cooper, Washington, D. C., United States Department of Labor (William J. Kilberg, Solicitor of Labor, James G. Johnston, Associate Solicitor of Labor) for the Director, Office of Workmen's Compensation Programs, United States Department of Labor.

Before: Albert, Chairman, Parkinson and Ray, members.

Albert, Chairman:

• • •

denied, 406 U. S. 958 (1972); *Humble Oil and Refining Co.* v. *Philip A. Taliaferro and Glenn L. Menear*, BRB No. 107-73 (June 1, 1973).

The petitioners' final contention on appeal is that the Supplemental Decision and Order assessing them for that portion of the claimant's attorney's fees earned subsequent to the effective date of the 1972 amendments to the Act, is not in accordance with law. Although the original Decision and Order made the entire fee a lien upon the compensation award pursuant to pre-amendment Section 28, 33 U. S. C. 928, the judge modified his award of attorney's fees in accordance with his interpretation of the amendment of Section 28 effective November 26, 1972. As amended, that section directs in substance that a successful claimant's attorney's fee is to be assessed against the employer or carrier. The petitioners argue that since the cause of action arose prior to the amendments, the apportionment

of fees was an unconstitutional retroactive application of the amended statute. This Board has already held otherwise. *Suderman Stevedores, Inc. and Texas Employers' Insurance Assoc.* v. *Seab Sanders, supra; see Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The mere fact that a statute applies retrospectively does not render it unconstitutional. *Cohen, supra* at 554. Given the well-established view that the Act is humanitarian in nature and should be construed liberally to effectuate its purposes, *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 200 (1952), the Board finds that the apportionment of attorney's fees in the instant case was proper since it served to prevent a decrease in the disability benefits actually due the claimant.

Pursuant to the provisions of Section 28 of the Act, 33 U. S. C. 928, the Board hereby awards to the claimant's attorney the sum of $500 as a reasonable fee in consideration of his preparation and presentation of the case before the Board, such fee to be paid by the employer or carrier directly and in a lump sum to the claimant's attorney.

The decisions and orders appealed from are in accordance with law and are supported by substantial evidence, and are hereby affirmed.

ALFRED G. ALBERT
Alfred G. Albert, Chairman

We concur:

E. WEST PARKINSON
E. West Parkinson, Member

JETER S. RAY
Jeter S. Ray, Member

Dated in Washington, D. C.
this 2nd of April 1974"

Conclusion

This issue of jurisdiction was a question of fact and the Deputy Commissioner as the trier of the facts has resolved this issue in favor of the claimant. There is substantial evidence in the record to sustain this finding. The District Court arrived at the same conclusion. As a matter of law, this decision is not appealable since it involves a question of fact only and not a question of law.

The carrier's complete lack of good faith in discharging its obligation under the terms of its compensation policy, render it liable for all costs in these proceedings under Section 926 of the Longshoremen's and Harbor Worker's Compensation Act.

An additional fee in the amount of $2,500.00 is requested to be assessed solely against the carrier for services rendered by claimant's attorneys.

Respectfully submitted,

Israel, Adler, Ronca & Gucciardo,
160 Broadway,
New York, New York 10038.
(212) BA 7-1350

By Angelo C. Gucciardo.

Certificate of Service

I hereby certify that the foregoing Brief for Defendant-Appellee-Cross-Appellant Eugene McMullen, Dec'd by George McMullen, Executor, was served on

Jacowitz & Silverman
44 Court Street
Brooklyn, New York 11201
Attorneys for Plaintiffs-Appellants-Appellees and on

William J. Kilberg
Solicitor of Labor
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Attorney for Defendant-Appellee-Cross-Appellant John D. McLellan, Jr., Deputy Commissioner,

by mailing copies thereof to said attorneys by mail, postage prepaid, on April 29, 1974.

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